ORIGINAL

No. 03-9877

SUPREME COURT, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JON B. CUTTER, ET AL., PETITIONERS

v.

REGINALD WILKINSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

MARK B. STERN
MICHAEL S. RAAB
CATHERINE Y. HANCOCK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

## QUESTION PRESENTED

Whether the institutionalized-persons provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc-1, are valid under the Establishment Clause of the First Amendment.



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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 349 F.3d 257. The opinion and order of the district court (Pet. App. B), adopting the report and recommendation of the Magistrate Judge, is reported at 221 F. Supp. 2d 827.

## JURISDICTION

The court of appeals entered its judgment on November 7, 2003. The court of appeals denied petitions for rehearing on March 3, 2004. The petition for a writ of certiorari was filed on April 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. RLUIPA is a civil rights law designed to provide, as a matter of statutory right, heightened protection for the free exercise of religion and to prevent religious discrimination in particular settings. At the time of RLUIPA's enactment, evidence before Congress demonstrated that, in the absence of federal legislation, prisoners, detainees, and individuals institutionalized in mental hospitals faced substantial and unwarranted burdens in freely practicing their religious faiths. See, e.g., H.R. Rep. No. 219, 106th Cong., 1st Sess. 9-10 (1999) (summarizing testimony). Based on the evidence it compiled, Congress concluded that the rights of institutionalized persons to practice their faith often were burdened by "frivolous or arbitrary rules," and that, whether for reasons of "indifference, ignorance, bigotry, or lack of resources," some institutions restrict religious liberty in "egregious and unnecessary ways." Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7775 (daily ed. July 27, 2000).

Congress responded by enacting Section 3 of RLUIPA to provide institutionalized persons protection from unnecessary burdens on religious practice. 42 U.S.C. 2000cc-1.[1] Section 3(a) provides

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[1] Section 2 of the statute, 42 U.S.C. 2000cc, protects persons and entities against land-use regulations that burden religious exercise or discriminate on the basis of religion. That portion of RLUIPA is not at issue in this suit.



that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a).[2] RLUIPA defines the "government" to which it applies as "a State, county, municipality, or other governmental entity created under the authority of a State," and "any branch, department, agency, instrumentality, or official of [such] an entity." 42 U.S.C. 2000cc-5(4).[3]

Invoking its power under the Spending Clause, U.S. Const., Art. I, § 8, cl. 1, Congress required compliance with Section 3(a) whenever "the substantial burden [on religion] is imposed in a

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[2] 42 U.S.C. 2000cc-1(a) provides in full:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person --
>
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

[3] Through the Religious Freedom Restoration Act, 42 U.S.C. 2000bb et seq., Congress has imposed a much broader obligation on the federal government to justify substantial burdens on religion imposed by any federal governmental activity -- not just zoning or institutionalization.

program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1). Congress also exercised its Commerce Clause power, U.S. Const., Art. I, § 8, cl. 3, as an independent constitutional basis for Section 3 in those cases where "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-1(b)(2). However, even if a plaintiff demonstrates the requisite effect on commerce, RLUIPA's provisions do not apply if the defendant demonstrates, as an affirmative defense, that the type of burden at issue, in the aggregate, would not have a substantial effect on commerce. 42 U.S.C. 2000cc-2(g).[4]

RLUIPA creates a private right of action, which allows any individual whose exercise of religion has been substantially burdened to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). The United States

[4] 42 U.S.C. 2000cc-2(g) provides:

> If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.



also may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. Petitioners are inmates incarcerated in Ohio correctional facilities who profess to subscribe to a variety of religious denominations, including the Church of Jesus Christ Christian, Odinism, and the Wiccan faith. Each petitioner claims that prison officials failed to accommodate his religious exercise in a variety of different ways. Pet. App. B at 5. The petitioners commenced three separate suits against officials of the Ohio Department of Rehabilitation and Corrections, alleging, as relevant here, that state officials violated RLUIPA by denying their requests for religious accommodation. See Pet. App. A at 3; Pet. 3-5.

The defendants moved to dismiss the complaint on the ground that RLUIPA violates the Establishment Clause and exceeds Congress's Spending Clause and Commerce Clause powers. See Pet. App. B at 3. The United States intervened in the district court, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the statute. See Pet. App. A at 3.

The district court denied the motion to dismiss. Pet. App. B. The court held that RLUIPA's institutionalized-persons provisions are consistent with the Establishment Clause and the Tenth and Eleventh Amendments and reflect a proper exercise of Congress's Spending Clause power. Id. at 3-18.

3. The court of appeals reversed. Pet. App. A. The court held that RLUIPA's institutionalized-persons provisions violate the Establishment Clause. Id. at 4-8. In so holding, the court of appeals recognized that its ruling directly conflicted with the published decisions of two other circuits and two district courts. Id. at 4 (citing Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002), cert. denied, 124 S. Ct. 66 (2003); Johnson v. Martin, 223 F. Supp. 2d 820 (W.D. Mich. 2002); Charles v. Verhagen, 220 F. Supp. 2d 955 (W.D. Wis. 2002), aff'd, 348 F.3d 601 (7th Cir. 2003)). The Fourth Circuit subsequently joined those courts in upholding the constitutionality of RLUIPA's institutionalized-persons provisions. See Madison v. Riter, 355 F.3d 310 (2003), petition for cert. pending, No. 03-1404 (filed Apr. 6, 2004). The panel also recognized that five courts of appeals (the D.C., Fifth, Seventh, Eighth, and Ninth Circuits) have rejected similar Establishment Clause challenges to the Religious Freedom Restoration Act. Pet. App. A at 4 (collecting cases). The court declined to join "this apparent juggernaut of circuit and district court opinions," ibid., based on its contrary view that "RLUIPA has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights," id. at 5, and that "the primary effect of RLUIPA is not simply to accommodate the exercise of religion by individual prisoners, but



to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners," id. at 7. The court further reasoned that RLUIPA "has the effect of encouraging prisoners to become religious in order to enjoy greater rights." Ibid. The court thus concluded that "RLUIPA's inevitable effect is to give greater freedom to religious inmates, and to induce nonreligious inmates to adopt a religion." Ibid.

**DISCUSSION**

On April 6, 2004, Virginia prison officials filed a petition for a writ of certiorari seeking review of the same Establishment Clause question presented by petitioner in this case. See Petition for a Writ of Certiorari at i, 9-18, Gary Bass, et al. v. Ira Madison, et al., No. 03-1404. The Bass petition also seeks a decision from this Court on whether RLUIPA's institutionalized-persons provisions reflect a proper exercise of Congress's legislative authority under the Spending or Commerce Clauses and whether RLUIPA's institutionalized-persons provisions may be enforced through actions under Ex parte Young, 209 U.S. 123 (1908). See 03-1404 Pet. i (Questions 2 and 3).

On May 28, 2004, the United States filed a brief agreeing that the petition in Bass v. Madison, No. 03-1404, should be granted only with respect to the Establishment Clause question. 03-1404 U.S. Br. 7-10. The United States' brief separately argues (id. at 11-13) that review of the second and third questions presented --

whether RLUIPA's institutionalized persons provisions are valid Spending or Commerce Clause legislation and whether they may be enforced through an action under Ex parte Young, supra -- should be denied because those questions were not decided by the Fourth Circuit, no conflict in the circuits exists on those questions, the Commerce Clause question has not yet been joined in that litigation, and review of the Spending Clause question would be premature before the lower courts have had the opportunity to consider and apply this Court's recent Spending Clause ruling in Sabri v. United States, 124 S. Ct. 1941 (2004). Respondent Madison has also filed a brief acquiescing in certiorari only with respect to the Establishment Clause question.

As discussed in the United States' brief in Bass, 03-1404 U.S. Br. 10 & n.8, the later-filed petition in the present case should be held pending this Court's disposition of the Bass petition and, if review is granted in Bass, pending the Court's decision in that case. The Bass case presents an appropriate vehicle for resolution of the Establishment Clause question presented, and the present case would add nothing distinctive, procedurally or substantively, to the full and fair presentation or consideration of that question. The United States has participated in the Bass case, in defense of the constitutionality of RLUIPA, since the district court. The district court and court of appeals in Bass were presented with and considered a broad spectrum of arguments



pertaining to the Establishment Clause question, and both of those courts accordingly issued thorough yet conflicting decisions that provide a constructive framework for the issue's consideration by this Court. The facts of the Bass case are simple and straightforward, presenting a common, familiar, and fairly illustrative context in which to consider the basis for congressional legislation and to apply the constitutional analysis dictated by the Establishment Clause. Lastly, the posture in which the Bass case arises allows this Court to control the scope of the constitutional issues presented for the Court's consideration by limiting the grant of certiorari to the Establishment Clause question presented, which is the only issue on which the courts of appeals are in conflict and which is the only issue ripe for this Court's review.

The present case, by contrast, provides a less optimal vehicle for this Court's review, due to the multiplicity of parties and factual claims presented in the three combined cases, and the complications in the alignment of all the different parties as petitioners and respondents that would arise were the Court to consolidate consideration of this case with the earlier-filed Bass petition. In addition, were the Court to grant the instant petition, the respondent state officials would be free to raise a host of distinct constitutional challenges to RLUIPA as alternative grounds for affirmance. That would skew the briefing of the case

and could require this Court to address a number of difficult, sensitive, and vitally important constitutional issues without the benefit of their consideration by the court of appeals in the instant case, in Bass, or elsewhere.

**CONCLUSION**

The petition for a writ of certiorari should be held pending this Court's disposition of the petition for a writ of certiorari in Bass v. Madison, No. 03-1404, and, if review is granted in that case, pending the Court's decision in Bass v. Madison.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARK B. STERN
MICHAEL S. RAAB
CATHERINE Y. HANCOCK
Attorneys

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